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Judicial Comment on Evidence

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boards, notwithstanding such a legislative pronouncement as this, for example: "The bureau shall have full power and authority to hear and determine all questions within its jurisdiction, and its decision thereon shall be final."

We are among those who have insisted, continuously, and sometimes rather strenuously, that such provisions are un-American, and that there should be substituted a right of review and we favored "review" rather than "appeal." But it has also been our contention—the argument being thus far ineffective and uneffective—that administrative procedure may and should be so organized that administrative action would be appealable under the foregoing provision as it now stands. As a member of one of these bureaus, we hold it to be the duty of such bureaus to use extraordinary legislative grants of power in such a way that ultimate justice may be approximated, and are firmly convinced that if such power were so exercised there would be fewer requests that the judiciary "assume" jurisdiction or that the legislature amend the law.

Of course, no wide-open policy should be inaugurated. There must come a time in every case when the gate should be closed through limitation provisions. But whenever and wherever reasonable and reasoning men might differ, the gate should be left open as long as fairminded application of common-sense practices will permit, under the law. We believe it should be done; we think it can be done; we hope it may be done before we retire as a member of one of such administrative bureaus.

It is our conviction that Section 18 of the Compensation Act, to use that law again for an example, was inserted for the particular purpose of doing the sort of justice that should be the aim of all right-minded men. That Section reads: "If the original claim for compensation has been made within the time specified in Section 15 the bureau may, at any time, on its own motion or on application, review the award, and, in accordance with the facts found on such review, may end, diminish or increase the compensation previously awarded, or, if compensation has been refused or discontinued, award compensation."

Having been authorized and empowered to make decisions that are final, such bureaus ought to have the disposition to review their own decisions, *upon their own motion,* and to frame their findings and conclusions, originally and upon such review, in such a way that an "appealable order or award" may be entered, especially whenever the record discloses conflicting or incomplete facts—the ultimate aim, of course, always being a final equitable decision rather than arbitrary or technical support of a previous "non-appealable order," which may or may not be equitable.

Using their extraordinary grants of power in such a way, it is our judgment, ultimate justice will be more nearly approximated, and there will be few, if any, requests that the judiciary "assume" jurisdiction or that the legislature amend the law.

JUDICIAL COMMENT ON EVIDENCE

Lawyers have certainly not come to agreement upon the advisability of restoring to trial judges the common law right of expressing opinions on the weight of evidence and the credibility of witnesses in jury cases while laymen and legislators seem quite definitely dis-

posed to prevent such restoration. It is with the view, then, of more definitely searching out the opinion of our own Bar that we offer the following expressions from rather authoritative sources:

Professor Dicey, in his "Law of the Constitution," page 389, says: "Trial by jury is open to much criticism; a distinguished French thinker may be right in holding that the habit of submitting difficult problems of fact to the decision of twelve men of not more than average intelligence will in the near future be considered an absurdity as patent as ordeal by battle. Its success in England is wholly due to, and is the most extraordinary sign of, popular confidence in the judicial bench. A judge is the colleague and readily accepted guide of the jurors."

Senate Bill No. 1094, 70th Congress, offered by Senator Caraway, of Arkansas, seeks to prevent federal judges from making such comments, the Senator's argument being: That judicial comment on evidence and the credibility of witnesses constitutes "a clear invasion of the province of the jury and, therefore, a flagrant usurpation of the prerogative of the jury to weigh the evidence;" and that it improperly influences the jury, the jurymen being inclined meekly and blindly to accept the views indicated by the judge.

Chief Justice Taney, in *Mitchell vs. Harmony,* 13 *Howard* 115, makes this terse comment: "Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact."

Justice Holmes, in *Graham vs. U. S.,* 231 *U. S.* 474, also answers the objection in these words: "Universal distrust creates universal incompetence. In the courts of the United States the judge and jury are assumed to be competent to play the parts that have always belonged to them in the country in which the modern jury trial had its birth."

Dean Pound, in his "Spirit of the Common Law," also refers to the subject, and says: "In particular it may be shown that legislation restricting the charge of the court has grown out of the desire of eloquent counsel, of a type so dear to the pioneer community, to deprive not merely the trial judge but the law of all influence upon trials and to leave everything to be disposed of on the arguments."

To the same point spoke Professor Sunderland before the American Bar Association meeting at Detroit in 1925: "A few weeks spent in watching jury cases tried in England will convince one that the summing up does more to secure a verdict on the merits than all the rules of evidence which legal ingenuity has devised. . . . Naturally his presentation (the judge's) will have weight with the jury, as it ought to have, for there can hardly be any doubt about the immense value of a nonpartisan summary after counsel have urged their antithetical views upon the jury."

COMPENSATION AND LIABILITY ACTS

Two recent decisions of the U. S. Supreme Court bring out some of the points of distinction between compensation acts and the Federal Employers' Liability Act.